85-1775

Supreme Court, U.S.
FILED
APR 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE
UNITED STATES

_____Term, 19____

No. _____

T. E. Macurdy, Petitioner

v

The Honorable Robert E. Dauer; Robert Colville, District Attorney of Allegheny County; The Commonwealth of Pennsylvania; Tom Foerster, Pete Flaherty and Barbara Hafer, Commissioners of the County of Allegheny; Charles Starrett, Court Administrator for the County of Allegheny.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

T. E. Macurdy
Petitioner Pro Se
P. O. Box 4058
Flagstaff Star Route
Boulder, Colorado 80306
(303) 443-0726

50 pp

QUESTIONS PRESENTED

The questions presented in this instance for the Court's consideration are:

A. Whether or not the discretionary power of a federal district judge to set aside a notice of default is absolute or must the court, in setting aside a default, apply some minimum standards of law and fact.

B. Whether or not a judge is absolutely immune from civil liability or immune from equitable redress under 42 U.S.C.A. 1983 to an injured individual when it has been alleged that said judge has acted totally and completely outside the scope of his judicial authority or jurisdiction.

C. Whether or not the federal courts have an obligation and right to interfere in the purported administration of a state's theoretical criminal procedure thereby affirming that an individual's rights under 42 U.S.C.A.

983 and rights conferred upon an
ndividual under amendments IV, V, and
IV of the United States Constitution
are superior to state procedure.

D. Whether or not a civil servant is entitled to prosecutional immunity either for personal damages or for equitable redress under 42 U.S.C.A. 1983 where an injured party has alleged that said civil servant has acted willfully, maliciously, and intentionally to deprive the aggrieved party of civil liberties guaranteed under 42 U.S.C.A. 1983 and rights conferred under Amendments IV, V, and XIV of the United States Constitution. In conjunction therewith, should such a civil servant be deemed, as a matter of law, not to have to defend against such charges and be immune from suit, is the consequences of such a decision a declaration by the federal courts that 42 Pa. C.S.A. § 8550 relating to liability for willful misconduct, unenforceable or unconstitutional.

TABLE OF CONTENTS

	Page
Questions Presented	1
Opinions Below	3
Jurisdiction	4
Statutes Involved	5
Statement of the Case	7
Argument	12
Conclusion	29
Certificate of Mailing	31

TABLE OF AUTHORITIES

Cases	Page
JUDICIAL DECISIONS	
Bradley v. Fisher, 13 Wall. 355	17
Chandler Leasing Corporation v. UCC Inc., 91 F.R.D. 81.	13
Clark v. Campbell, 514 F. Supp. 1300, D.C. Ark. 1981.	19
Cooper v. Hutchinson, 184 F.2d 119.	23
Dombrowski et al. v. Pfister, 380 U.S. 479	21
Ex parte Young, 209 U.S. 123	21
Harris v. Harvey, 605 F.2d, 330, C.A. Wis. 1979 . .	19
Imbler v. Patchman, 424 U.S. 409 (1976).	11
In re: Arthur Treacher's Franchisee Litigation, 92 F.R.D. 398	13
Lane v. McDevitt, 255 F. Supp. 414 U.S.D.C.E.D. Pa 1966	17
Santiago v. City of Philadelphia, 435 F. Supp. 136, D.C. Pa. 1977. . .	19

TABLE OF AUTHORITIES - Continued

	Page
Scheuer v. Rhodes, 332 U.S. 243.	26
Sears, Sucsy, and Company v. The Insurance Co. of North America, 392 F.Supp. 398	14
Stump v. Sparkman, 435 U.S. 349 (1978).	11
Statutes	
28 U.S.C. § 1254.	4
S Ct Rule 20.4	4
28 U.S.C. § 2101.	4
42 U.S.C.A. 1983	5
42 Pa.C.S.A. § 8550	6
Amendment IV, United States Constitution	6
Amendment XIV, United States Constitution	6

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this matter on the 7th day of January 1986.

OPINIONS BELOW

The January 7 opinion of the Third Circuit Court of Appeals (Appendix page A-1) is a denial of a petition for rehearing or amending its previous decision in the within matter entered November 15, 1985 (Appendix pages A-2-5) reported at _____ which is in essence an affirmation of the judgment of the Federal District

Court for the Western District of Pennsylvania (Appendix page A-6-10).

JURISDICTION

The judgment of the Third Circuit Court of Appeals (Appendix A, infra) was entered on November 15, 1985, and a timely petition for rehearing was denied on January 7, 1986 (Appendix A, infra). The jurisdiction of the Supreme Court of the United States is invoked under and pursuant to 28 U.S.C. § 1254 and a timely petition for writ of certiorari is filed in accordance with S Ct Rule 20.4 and 28 U.S.C. § 2101.

It is requested that this court exercise jurisdiction in this matter under Rule 17(a) on the premise that a federal court of appeals has rendered a decision in conflict with the controlling law as previously laid

down by itself and the Supreme Court of the United States in similar matters and has decided a federal question in a way totally in conflict with existing and well established principles of law as to call for the exercise of this Court's power of supervision.

STATUTES INVOLVED

The following statutes of the federal government, articles of the Constitution of the United States, or laws of the Commonwealth of Pennsylvania are involved in this matter.

A. 42 U.S.C.A. 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

B. 42 Pa.C.S.A. § 8550

In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of sections 8545 (relating to official liability generally), 8546 (relating to defense of official immunity), 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply.

C. Amendment IV, United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

D. Amendment XIV, United States Constitution

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

> they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

STATEMENT OF THE CASE

The issues raised on this petition for writ of certiorari arise from a civil complaint filed by petitioner herein, T. E. Macurdy, against defendants named in the caption of this case, the original complaint having been filed in the United States District Court for the District of Colorado. Defendants Colville, Flaherty, Hafer, and Foerster, having failed to file a responsive pleading within the statutory time allowed, a notice of default was entered on July 10, 1984. Judge Zita Weinshienk, without permitting

Plaintiff Macurdy an opportunity to respond to a petition to set aside the notice of default, on August 6, 1984, set aside default entered against the aforesaid Defendants and subsequently transferred the case to the Federal District Court for the Western District of Pennsylvania. The primary premise for relief in the original complaint was that one Judge Robert E. Dauer of the Court of Common Pleas of Allegheny County had harmed the Plaintiff, T. E. Macurdy, by acting outside the scope of his jurisdiction and authority as follows. On August 1, 1983, Judge Dauer dismissed two criminal complaints pending against T. E. Macurdy. Subsequently, while these cases were not pending and had no standing whatsoever, Judge Dauer entered an order directing tht T. E. Macurdy be extradited from his state of residence and citizenship,

Colorado, to the Commonwealth of Pennsylvania. Officials of the State of Colorado, presuming Judge Dauer's order of extradition to be effective and having no knowledge that the cases had been dismissed delivered T. E. Macurdy to officials from Pennsylvania and said T. E. Macurdy was accordingly transported to Pennsylvania. At that time, Judge Dauer set a bond for the release of T. E. Macurdy, even though the charges involved were still in a state of nonexistence. Subsequently, someone, whose identity is unknown to petitioner herein, discovered the impropriety of the actions that had been thus far committed and the District Attorney of Allegheny County, Robert Colville, defendant in this matter, knowing full well that he had no authority to do so and that he was acting contrary to most of the defendant's guaranteed Constitutional

rights, presented a petition to Judge Dauer requesting that the previous order dismissing the various criminal cases be revoked and the cases reinstated. Judge Dauer, instead, entered an order declaring that his original order dismissing the cases involved was void. All of these various matters took place without any notice to party T. E. Macurdy or his attorney, without hearing, and without transcript. Inasmuch as T. E. Macurdy had no knowledge of the actions which were taking place and affecting his rights to such a large degree until months after these actions had been taken, the first time these issues were raised was in his civil complaint filed in Colorado. The premise of the civil complaint was that harm had been committed to T. E. Macurdy in the State of Colorado, his state of residency and citizenship, and that this

harm had been caused by various officials of the Commonwealth of Pennsylvania. Jurisdiction was conferred upon the federal courts on the premise of diversity of citizenship.

The Federal District Court for the Western District of Pennsylvania held that Judge Robert Dauer is absolutely immune from suit, citing Stump v. Sparkman, 435 U.S. 349 (1978), held that district attorney Colville is immune from suit citing Imbler v. Patchman, 424 U.S. 409 (1976) (see Appendix, infra).

The Third Circuit Court of Appeals held that the District Court for the District of Colorado did not abuse its discretion in setting aside its notice of default against Defendants Colville, Foerster, Flaherty, and Hafer and affirmed the Federal District Court's decision that Judge Dauer was absolutely immune from suit

and that Defendant Colville was entitled to immunity, citing the same cases (see Appendix, infra).

ARGUMENT

A. Judge Weinshienk of the Colorado Federal District Court, in setting aside the notice of default based on the petition of the Defendants and the supporting affidavits, and without providing Plaintiff an opportunity to respond to the moving party's petition, has deviated substantially from well established law of this court and other federal district courts and the law of the State of Colorado which would control in this instance and as such has abused her discretion (Appendix page A-11).

It has been well established by a number of federal and state cases that the defaulting party must show

that he has a meritorious defense on the issues, must show the reason for the failure to file the responsive pleading in a timely manner, must file the motion to set aside promptly, and show that the non-defaulting party will not be substantially prejudiced. In re: Arthur Treacher's Franchisee Litigation, 92 F.R.D. 398. In Chandler Leasing Corporation v. UCC Inc., 91 F.R.D. 81, the court held that failure to show any one of these elements, to wit, excusable neglect, existence of a meritorious defense, lack of prejudice to the non-defaulting party, and reasonably quick action in moving to correct the default requires denial of motion to vacate (emphasis added). The courts have likewise held that neither ignorance nor carelessness on the part of a litigant or an attorney will provide grounds for relief from a judgment on

the ground of mistake, inadvertence, surprise, or excusable neglect. Sears, Sucsy, and Company v. The Insurance Co. of North America, 392 F.Supp. 398.

There is nothing in the individual defendants' or their secretaries' affidavits which would constitute any factual basis upon which the default judgments could be opened. As to the affidavit of Georgia Dusenbery, senior claims representative of CNA in Denver (Appendix pages A-12 and A-13), it appears she is making this affidavit, in part, upon information which is hearsay. She has no personal knowledge that the summons and complaint were sent to one Evan Lloyd of the Allegheny County Legal Department on June 13, 1984, and in fact only has personal knowledge that she received the file on July 12, 1984, in Denver.

What CNA did with the file between the time they received it and July 12 is not indicated. It should be noted that Georgia Dusenbery does not, in her affidavit, support the statement set forth in the motion that it took from June 21, the alleged date of mailing of the complaint, until June 28, the alleged date of receipt of the complaint, by CNA in Pittsburgh.

Judge Weinshienk wrote no formal opinion to sustain her position and the Third Circuit Court of Appeals sustained Judge Weinshienk's action without comment. In so doing, both courts have deviated substantially from the existing law of this court and the various federal district courts, for nothing contained in the pleadings filed by the defaulting parties provides any basis under established existing law for the setting aside of the default. Should

this court decline to reverse accordingly, this case would become existing law and could be cited as authority to set aside any default without any factual or legal basis whatsoever except the filing of a timely request accordingly for that is the only standard which can be said to have been met in the instant case.

It is respectfully requested that this court consider this issue, reversing both the Third Circuit Court of Appeals and the Federal District Court for the District of Colorado, directing that the defaults be reinstated.

B. Judge Barron McCune of the Federal District Court for the Western District of Pennsylvania and the Third Circuit Court of Appeals have both held that Judge Dauer is absolutely immune from suit, citing Stump v. Sparkman, 435 U.S. 349 (1978). This

is a complete and absolute deviation from the opinion of the United States Supreme Court in Stump v. Sparkman and is a deviation of the previous law of the Federal District Courts of Pennsylvania. Lane v. McDevitt, 255 F.Supp. 414 U.S.D.C.E.D. Pa 1966.

The controlling issue as laid down by this court in Stump v. Sparkman at page 356 citing Bradley v. Fisher, 13 Wall. 355, a judge. . . "will be subject to liability only when he acted in the 'clear absence of all jurisdiction'." Both lower courts have stated categorically that the Defendant in this case, Judge Dauer, is absolutely immune from liability. This is a clear misstatement of the existing law of both the Third Circuit and of the Supreme Court of the United States. Macurdy contends in this case that Judge Dauer acted in the clear absence of any jurisdiction or

authority and it would be impossible to conceive otherwise inasmuch as Judge Dauer took steps in cases which were non-existent and which he knew to be non-existent. To permit the Third Circuit Court of Appeals' affirmation of the Federal District Court's actions to stand will constitute an entire new legal interpretation of the law regarding judicial immunity and the theory of authoritative or jurisdictional propriety will have been erased from the requirements of judicial actions.

Inasmuch as equitable relief and redress was likewise sought, and inasmuch as it has clearly been the law of this court as in every federal district court that equitable relief under 42 U.S.C.A. 1983 has always been a proper redress against a judge, to permit the Third Circuit Court of Appeals' opinion in this case to stand

will materially alter existing law allowing no redress in equity for infringement of federally guaranteed constitutional or statutory rights.

Neither the federal nor state judiciary is immune from injunctive relief in applying the law set forth at 1983. Doctrine of judicial immunity does not bar injunctive relief. Harris v. Harvey, 605 F.2d, 330, C.A. Wis. 1979. Doctrine of judicial immunity is restricted to damage actions under this section and does not apply strictly where injunctive or protective relief is sought. Clark v. Campbell, 514 F. Supp. 1300, D.C. Ark. 1981. State judges are not immune from suits seeking injunctive and declaratory relief. Santiago v. City of Philadelphia, 435 F. Supp. 136, D.C. Pa. 1977.

Wherefore, it is requested that the Supreme Court of the United States

consider this issue and reverse the Third Circuit Court of Appeals and the Federal District Court for the Western District of Pennsylvania and remand the case for trial.

C. The Third Circuit Court of Appeals stated that the Federal District Court for the Western District of Pennsylvania was correct in dismissing the complaint against Defendant Colville citing Imbler v. Pachtman, 424 U.S. 409 (1976).

For the most part, Imbler v. Pachtman and the facts situated therein, has no bearing upon the instant case in that no injunctive relief under 42 U.S.C.A. 1983 was sought in the Imbler case whereas such relief is sought in the within case.

To deny injunctive relief where an allegation of irreparable harm under the Constitution has been made would be a deviation from the existing

law of this court and a material alteration in the existing law for this country.

One of the most significant cases in the areas of intervention in the state's criminal process by the Federal Courts is Dombrowski et al. v. Pfister, 380 U.S. 479. The court stated that equitable relief would be granted to prevent a substantial loss or impairment of freedom of expression resulting under an excessively broad statute regulating expression. Within the context of the case, Ex parte Young, 209 U.S. 123 is cited, page 483, "'. . . threaten and are about to commence proceedings either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal constitution. . . .'." The court went on to conclude that on the allegations of the complaint, if true, abstention and

the denial of injunctive relief may well result in the denial of any effective safeguards against loss of protected freedoms of expression, and cannot be justified.

In the instant case an individual freedom guaranteed by the Constitution, that of freedom against illegal search and seizure, is equally threatened. If a state can, on the basis of false and fraudulent documents, forcibly and illegally remove an individual from his state of domicile and the federal courts are powerless to act except through the timely and expensive process of appellate procedure through the state courts and then to the federal courts, then essentially there is no Constitutional guarantee against illegal search and seizure. The defendant in such a proceeding is obligated to spend years in litigation in state

courts which have already approved the illegality of their own acts when it is clear that the proceedings in state court will be essentially a waste of time and effort.

In the instant case the Commonwealth of Pennsylvania is using its own illegal and unconstitutional conduct to acquire jurisdiction over the Plaintiff. A state is precluded by law from taking advantage of or acquiring any rights whatsoever if it has acted illegally.

The existing law in the Third Circuit Court of Appeals was set down in Cooper v. Hutchinson, 184 F.2d 119 and reiterated in the Lane v. McDevitt ibid.

> "While the Supreme Court has not ruled specifically on this question, the Court of Appeals for this Circuit appears to have. In Cooper v. Hutchinson, 184 F.2d 119, it was held taht the reference in Section 1983 of Title 42 is such an express authorization and confers the power to enjoin state court proceedings."

In light of the gross impropri-eties of the state officials and state courts in the instant proceedings, it is respectfully submitted that this court must review the lower courts' decisions, reverse the same, and remand for trial or this court will have forever abandoned any initial federal judicial protection of an individual's federally guaranteed rights.

D. The question of whether or not a civil servant, of which the district attorney of a county is one, is immune from personal liability or equitable redress has already been established by Pennsylvania statutory law and case law in the affirmative.

Pennsylvania law 42 Pa.C.S.A. § 8550 states clearly that an individual of this type is liable under various conditions.

" In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of sections 8545 (relating to official liability generally), 8546 (relating to defense of official immunity), 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply."

In the instant case it was alleged by the plaintiff Macurdy that the district attorney of Allegheny County acted illegally, maliciously, and with willful misconduct and that proceeded with extradition after having been notified in accordance with the laws of the Commonwealth of Pennsylvania that in fact the cases involved in this matter had been dismissed. Such a statement of fact raises a clear issue of misconduct under Pennsylvania law and under 42

U.S.C.A. 1983 and as such the matter should not have been dismissed.

Additionally, there has never been any question under federal or state law that an individual is not entitled to equitable redress against a district attorney or any other party who has committed an act which places him under the auspices of 42 U.S.C.A. 1983. The most compelling case of this nature was decided by this court and the decision written by Chief Justice Burger in Scheuer v. Rhodes, 332 U.S. 243. This case established once and for all the principle that immunity is qualified and not absolute. Justice Burger, in the opinion, citing Mr. Justice Douglas,

> "In Monroe v. Pape, supra, Mr. Justice Douglas, writing for the Court, held that the section in question was meant 'to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position.' 365 U.S.,

at 172. Through the Civil Rights statutes, Congress intended 'to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.'"

This Court has even more recently expanded upon the doctrine of non-immunity to police officers and by extension such applications should certainly apply to individuals in a higher authority who are in a position to do more harm and more flagrantly violate the meanings and purposes of the Civil Rights Acts such as a district attorney. In the instant case, not only did the district attorney willfully involve himself in an extradition proceeding which was unlawful, he then, realizing the enormity of the impropriety of his

actions, involved himself in further unlawful acts in a futile attempt to extricate himself from the intricacies he had created by holding ex parte proceedings without notice, without hearing, without record, surreptitiously, apparently in the hope that his actions would go undetected. Plaintiff's complaint, paragraph 11, Appendix page A-14 to A-19.

Wherefore, it is respectfully requested that this Honorable Court, in reviewing the dismissal of the complaint against Robert Colville, District Attorney of Allegheny County, both at law and at equity, determine that the Federal District Court for the Western District of Pennsylvania erred in its dismissal and the Third Circuit Court of Appeals erred in affirming said dismissal and that this

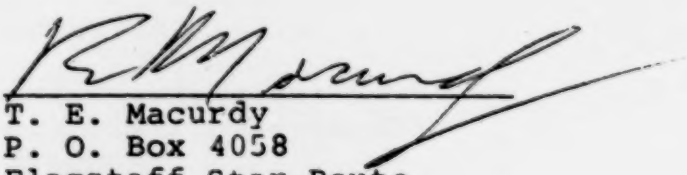
court reverse said opinions and remand the same for trial accordingly.

CONCLUSION

In conclusion, it is respectfully represented to the Court that both the Third Circuit Court of Appeals' decision and the decision of the Federal District Court for the Western District of Pennsylvania in stating categorically and without exception that Judge Dauer and Robert Colville are absolutely immune from suit, without taking into consideration the lack of Judge Dauer's jurisdiction and authority and the allegations of willful misconduct on the part of Robert Colville, and without taking into consideration the equitable redress requested, is such an extreme deviation from existing

controlling Federal Law as to require this Court's intervention and supervision.

Respectfully submitted,



T. E. Macurdy
P. O. Box 4058
Flagstaff Star Route
Boulder, CO 80306
Telephone: 303/443-0726

CERTIFICATE OF MAILING:

I, the undersigned, hereby certify that copies of the enclosed have been forwarded this day, first class mail, postage prepaid, to each of the following:

James McLean, Esquire
County Solicitor
Dennis Biondo, Esquire
Assistant County Solicitor
Allegheny County Law Building
300 Fort Pitt Commons Building
445 Fort Pitt Boulevard
Pittsburgh, PA 15219

Joel Kaufman, Esquire
Assistant District Attorney
401 Courthouse
Pittsburgh, PA 15219

Charles Johns, Esquire
Paul Gelman, Esquire
1414 Three Penn Center Plaza
Philadelphia, PA 19102

John Sherry, Esquire
608 Grant Building
Pittsburgh, PA 15219

Leroy Zimmerman, Esquire
Sheila Ford, Esquire
Allen Warshaw, Esquire
Office of Attorney General
4th Floor, Manor Building
564 Forbes Aenue
Pittsburgh, PA 15219

April 2, 1986

T. E. Macurdy

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-3230

T. E. MACURDY,
Appellant

v.

THE HONORABLE ROBERT E. DAUER, ET AL.

(C.A. No. 84-2157)

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, and MARIS, Circuit Judges

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a

majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

_____

Circuit Judge

Dated: Jan. 7, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3230

T. E. MACURDY,
Appellant

v.

THE HONORABLE ROBERT E. DAUER, ET AL.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA,
Hon. Barron P. McCune,
District Judge
(D.C. Civil No. 84-2157)

Submitted November 12, 1985
Before: ADAMS, HIGGINBOTHAM,
and MARIS, Circuit Judges

JUDGMENT ORDER

The court, having considered the briefs of the parties and having reviewed the record in this civil rights case in the District Court for the District of Colorado and in the Dis-

trict Court for the Western District of Pennsylvania, concludes

(1) that the District Court for the District of Colorado did not abuse its discretion

(a) in setting aside the notices of default against defendants Colville, Foerster, Flaherty, Hafer and the Commonwealth of Pennsylvania,

(b) in refusing to vacate its order granting defendant Starrett an extension of time to file his answer to the complaint, or

(c) in transferring the case to the District Court for the Western District of Pennsylvania;

(2) that the District Court for the Western District of Pennsylvania did not abuse its discretion in granting the defendants leave to renew their motions to dismiss and in consid-

ering and acting upon their motions to dismiss thereafter filed;

(3) that the District Court for the Western District of Pennsylvania did not err

(a) in dismissing the complaint as to defendant Judge Dauer since he was entitled to judicial immunity from suit, Stump v. Sparkman, 435 U.S. 349 (1978),

(b) in refusing to interfere in the administration of the criminal law of the Commonwealth of Pennsylvania, Younger v. Harris, 401 U.S. 37 (1971),

(c) in dismissing the complaint as to defendant Colville since he was entitled to prosecutorial immunity from suit, Imbler v. Pachtman, 424 U.S. 409 (1976),

(d) in dismissing the complaint as to defendants Foerster,

Flaherty and Hafer since it contained no allegations of their personal involvement and in a civil rights action such as this, they cannot be held liable under the doctrine of respondeat superior, Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1082 (3d Cir. 1976), or

(e) in dismissing the complaint as to the Commonwealth of Pennsylvania since the Commonwealth, unless it has waived its immunity which is not here alleged, was entitled under the Eleventh Amendment to the Constitution to absolute immunity from suit in the district court, Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam); and

(4) it further appearing that the plaintiff does not contest in this court the dismissal by the district

court of the complaint as against defendant Starrett;

It is ORDERED AND ADJUDGED that the orders appealed from, including the final order of the District Court for the Western District of Pennsylvania, be and they hereby are affirmed with costs taxed against appellant.

BY THE COURT,

_____

Circuit Judge

ATTEST:

_____

Sally Mrvos, Clerk

Dated: Nov. 15, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

T. E. MACURDY, Plaintiff	:	
vs.	:	Civil Action 84-2157
THE HONORABLE ROBERT E. DAUER, et al., Defendants	:	

M E M O R A N D U M

BARRON P. McCUNE, District Judge
Dated: March 22, 1985.

This diversity case was instituted in the federal district court for the district of Colorado on June 1, 1984, by plaintiff, who is apparently a member of the Bar. On August 30, 1984, the matter was transferred to this court based upon the doctrine forum non conveniens. We granted the motions to dismiss the complaint filed by defendants, the Honorable Robert Dauer and Charles Starrett, Allegheny County Court Administrator, on November 1, 1984. Plain-



tiff, T. E. Macurdy, appealed our order dismissing the complaint. On January 9, 1985, the Court of Appeals for the Third Circuit dismissed the appeal because it was not from an appealable order.

Defendant, Commonwealth of Pennsylvania, filed a motion to dismiss the complaint for failure to state a claim upon which relief may be granted on October 29, 1984. On December 24, 1984, Defendants Colville, Foerster, Flaherty and Hafer filed a motion to dismiss the complaint or, in the alternative, a motion for summary judgment. Colville is the District Attorney of Allegheny County. The other defendants are Allegheny County Commissioners. Despite order of this court dated January 21, 1985, directing plaintiff to show cause, in writing, why the above motions should not be granted by

February 20, 1985, plaintiff has not responded.

Upon consideration of defendants motions and the applicable case law, we will grant defendants' motions to dismiss the complaint.

Plaintiff alleges in his complaint that on August 1, 1983, two criminal complaints against him were dismissed in the Court of Common Pleas of Allegheny County. Plaintiff further alleges that on August 9, 1983, the Boulder County District Attorney's Office advised him that he was to be extradited to Pennsylvania. Plaintiff, not knowing the complaints had been dismissed, voluntarily surrendered to the Boulder County Sheriff's Office. Upon his return to Pennsylvania, plaintiff claims the charges were wrongfully reinstated.

As stated above, the defendants who remain have filed motions to dismiss under Fed.R.Civ.P. 12(b)(6). Such a motion tests the sufficiency of the allegations of the complaint. The court must view the allegations of the complaint in a light most favorable to plaintiff, assume the allegations to be true and determine whether the complaint states valid claims for relief.

Plaintiff does not identify any specific cause of action in his complaint, but concludes that his extradition to Pennsylvania violated his civil rights. The complaint, however, contains no assertion of facts which show improper acts by the defendants remaining in the suit. "Conclusory contentions of constitutional violations without factual support do not estblish a civil rights deprivation sufficient to withstand a motion to

dismiss." Williams v. Patton, 410 F.Supp. 1, 3 (E.D. Pa. 1976), citing Fletcher v. Hook, 446 F.2d 14 (3d Cir. 1971).

Plaintiff's allegations of the denial of due process appear to be based on the reinstatement of the criminal charges against him without a showing of good cause and without a hearing. Such allegations should properly be addressed to the court in which the charges are pending.

Since it appears that plaintiff can prove no set of facts in support of his claim which would entitle him to relief, Conley v. Gibson, 355 U.S. 41 (1957), the complaint will be dismissed as to all defendants remaining.

An appropriate order follows.

BARRON P. McCUNE
UNITED STATES
DISTRICT JUDGE

Dated: March 22, 1985.
cc: Counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

T. E. MACURDY, Plaintiff	:	
vs.	:	Civil Action 84-2157
THE HONORABLE ROBERT E. DAUER, et al., Defendants	:	

O R D E R

AND NOW, March 22, 1985, the motion to dismiss filed by defendants Robert Colville, Tom Foerster, Peter Flaherty and Barbara Hafer, and the motion to dismiss filed on behalf of the Commonwealth of Pennsylvania are granted.

BARRON P. McCUNE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

T. E. MACURDY, Plaintiff	:	
vs.	:	Civil Action 84-2157
THE HONORABLE ROBERT E. DAUER, et al., Defendants	:	

O R D E R

AND NOW, November 1, 1984, Motion to Dismiss having been filed by the Honorable Robert E. Dauer of the Court of Common Pleas of Allegheny Coun;ty, the motion is granted without further proceeding and without calling on plaintiff to show cause why the motion should not be granted.

Judge Dauer is immune from liability for damages as a matter of law, Stump v. Sparkman, 435 U.S. 349 (1978).

Further, this court will not interfere in the administration of the state's criminal law, Younger v. Harris, 401 U.S. 37 (1971).

The complaint against Judge Dauer is dismissed with prejudice.

BARRON P. McCUNE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-Z-1117

T. E. MACURDY,

Plaintiff,

v.

HONORABLE ROBERT E. DAUER, et al.,

Defendants.

MINUTE ORDER

ORDER ENTERED BY
JUDGE ZITA L. WEINSHIENK
Joan E. Boline, Admin. Secretary

Dated: August 6, 1984

It is ORDERED that the Motion to Set Aside Default filed by defendants Colville, District Attorney of Allegheny County, The Commonwealth of Pennsylvania, Tom Foerster, Pete Flaherty and Barbara Hafer, Commissioners of the County of Allegheny, is granted. It is

FURTHER ORDERED that the Notice of Default shall be set aside. It is

FURTHER ORDERED that plaintiff's Motion to Dismiss Minute Order Granting an Extension of Time to File Answer is denied. It is

FURTHER ORDERED that Defendant Charles Starrett's Motion for a More Definite Statement is denied. It is

FURTHER ORDERED that defendant Charles Starrett's Motion for Permission to File Brief is granted, and the Clerk shall file stamp Defendant Charles Starrett's Memorandum of Law in Support of Motion to Dismiss Plaintiff's Complaint. It is

FURTHER ORDERED that plaintiff may file a brief in opposition, not to exceed 10 pages, by August 29, and defendant Charles Starrett may file a reply brief, not to exceed 3 pages, by September 20.